

BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHCV 2010/039

BETWEEN:

(1) ROYAL WESTMINSTER INVESTMENTS S.A.
(2) BHAGWAN MAHTANI
(3) SUNDER DALAMAL
(4) NARI DALAMAL

Claimants

and

(1) NILON LIMITED
(2) MANMOHAN VARMA

Defendants

Appearances: Mr Scott Cruickshank and Ms Fiona Forbes for the first Defendant
Mr Mark Forte and Mr Jerry Samuel for the Claimants

JUDGMENT

[2010: 14, 21 December]

(Claim against first defendant company based upon collateral warranty/implied contract of allotment – held on 21 October 2010 in context of application by second defendant to set aside permission to serve proceedings on him in England under CPR 7.3(2)(a) that there was on that basis no real issue to be tried between the claimants and the first defendant and setting aside service accordingly – subsequent application by first defendant company to strike out claim – CPR 26.3, 15.2 – claimants applying to Court of Appeal for permission to appeal out of time that claimants had good claim against first defendant company under section 43 of the Business Companies Act, 2004 – whether first defendant's strike out application to be stayed to await outcome of claimants' application to Court of Appeal – whether first defendant entitled to succeed in light of claimants' renewed reliance upon section 43 – **Re Hoicrest Ltd** [2000] 1 BCLC 194 considered)

[1] **Bannister J [ag]:** This is an application by the first Defendant, Nilon Limited ('Nilon'), a BVI registered company, to strike out the claim against it under either or both of CPR 26.3 or 15.2 (no

reasonable ground for bringing the claim/no real prospect of success). The case is already acquiring something of a chequered history. On 21 October 2010 I gave judgment setting aside service of these proceedings against the second Defendant, who is resident in England. Rather than trying to summarise the history of the matter to date, or simply directing the reader to my earlier judgment, I think it will be more convenient if I reproduce here those parts of that judgment which outline the factual background and issues and which explain what has happened in the proceedings to date.

Factual background

- [2] The second to fourth Claimants claim to be parties, together with the second Defendant, to a joint venture agreement ('the JVA') made orally on about 25 October 2002 in England. They say that it was agreed that a BVI registered company would be incorporated in which each joint venturer would subscribe for shares and through which the business of commodity import and sale would be carried on in Nigeria. They say that the joint venture company was to be managed by the second Defendant or (according to the pleading) a group of companies with which the second Defendant is associated known as the Veetee Group. The Claimants say that it was agreed that each co-venturer would contribute to the capital of the proposed BVI company (although the amounts to be contributed are not pleaded). Importantly, they say that it was an obligation of the second Defendant under the JVA to procure the issue of shares in the proposed BVI company in certain agreed proportions, which I do not need to set out.
- [3] Nilon was incorporated here in the BVI about a fortnight later, on 7 November 2002. It appears that Nilon's incorporation was attended to by the second Defendant or by someone acting on his instructions.
- [4] It is the Claimants' case that although they (in the second Claimant's case, through the medium of the first Claimant company, in which the second Claimant has a substantial interest), have subscribed considerable sums of money to or for the benefit of Nilon and although each has received distributions of profits of the business carried on by Nilon or by subsidiary companies of Nilon (described in the amended statement of claim as dividends, although none of the Claimants is a member of Nilon), none of them has been allotted any shares in it and none has any rights to participate in its management.

The proceedings to date

- [5] In, I believe, March 2010 the Claimants issued these proceedings against Nilon and the second Defendant, claiming declarations that the first, third and fourth Claimants are the owners of shares in Nilon in the proportions agreed under the JVA and seeking rectification of Nilon's register of members to conform with this claimed entitlement.
- [6] The relief sought against the second Defendant is that he should be ordered to procure these results in accordance with his alleged obligations under the JVA.
- [7] The proceedings were served on Nilon within the Territory as of right.
- [8] On 5 May 2010 the Claimants applied *ex parte* for permission under CPR 7.3(2)(a) to serve out on the second Defendant.
- [9] I pointed out on that application that as the pleading stood there was no real issue to be tried as between the Claimants and Nilon. The Claimants are not shareholders in Nilon (all Nilon's shares having been allotted to the second Defendant). Indeed, the whole basis of their complaint is that they are not. They could not therefore be entitled to the declarations sought. Nor could they be entitled to rectification of Nilon's register of members, for the same reason.
- [10] Without an allegation that Nilon had entered into an enforceable agreement with the Claimants to allot shares to them, there could be no 'real issue' between the Claimants and Nilon which it would be reasonable for the Court to try, within meaning of CPR 7.3(2)(a)(i). So that the question whether the second Defendant was a necessary or proper party to a claim by the Claimants against Nilon could not arise.
- [11] I therefore refused permission to serve out, but indicated that if the Claimants could formulate and plead a case against Nilon, I would consider whether on an amended pleading it would be right to give permission to the Claimants to serve the second Defendant in England.
- [12] On 12 May 2010 the Claimants returned with an amended pleading. Paragraphs 14 to 17, 18 and 25 read as follows:

'Collateral Agreement and Warranty

14. On or about 7 November 2002, upon incorporation of the First Defendant, an implied agreement and warranty collateral to the Joint Venture Agreement arose between the Second, Third and Fourth Claimants and the Defendants (hereinafter referred to as the "Collateral Agreement and Warranty"), with the intent that the Joint Venture Partners should rely thereon, that the First Defendant would issue and allot voting shares and share certificates to the Joint Venture Partners or their nominees, in consideration for their investment, in accordance with the terms of the Joint Venture Agreement, specifically the proportions pleaded at paragraph 11(e)(i) to (iv) above.
15. The First Defendant was fixed with knowledge of the Collateral Agreement and Warranty by virtue of the Second Defendant's role as a Joint Venture Partner and as the authorized sole director and/or controller of the First Defendant.
16. The Collateral Agreement and Warranty is necessary to give business efficacy to the Joint Venture Agreement and/or as representing the clear and common intention of the Joint Venture Partner under the Joint Venture Agreement.
17. In performing the terms of the Joint Venture Agreement, the Second, Third and Fourth Claimants relied upon the foreseeable expectations created by the Collateral Agreement and Warranty. Further and/or alternatively, the First Defendant is stopped and/or stopped by convention from denying and/or resiling from its obligations to issue and allot shares to the Second, Third and Fourth Claimants, in accordance with Collateral Agreement and Warranty.

Consideration and Dividends

18. Between June 2004 and February 2006, in pursuance of the Joint Venture Agreement and the Collateral Agreement and Warranty, the Claimants paid or procured payment of consideration to the Second Defendant and/or the First Defendant through the Roxall and/or the Nilon Accounts, respectively, for shareholdings in the First Defendant as follows:
 - a) The Second Claimant caused the First Claimant to make payments totaling US\$1,673,958.72 on his behalf to the Second Defendant and/or the Veetee Group, in consideration for 37.5% shareholding in the First Defendant;
 - b) The Third Claimant made payments totaling US\$1,293,696 to the Third Defendant and/or the Veetee

Group, in consideration for 10% shareholding in the First Defendant; and

- c) The Fourth Claimant made payments totaling US\$1,293,696 to the Second Defendant and/or the Veetee Group, in consideration for 10% shareholding in the First Defendant.

....

Breach of the Collateral Agreement and Warranty

25. In breach of the Collateral Agreement and Warranty, the First Defendant:

- a) Refused and/or failed to issue and allot voting shares and share certificates to the Second, Third and Fourth Claimants or their nominees in accordance with the proportions pleaded at paragraph 11(e)(i) to (iv) above; and
- b) Refused and/or failed to enter the names and addresses of the Second, Third and Fourth Claimants or their nominees in its register of members.

By reason of the aforementioned breaches, the Claimants have suffered loss and damage, in that they have been deprived of shares and their rights as shareholders in the First Defendant. Full particulars of loss will be given after disclosure.'

There was also an amendment to the prayer:

'FURTHER OR ALTERNATIVELY, the Claimants claim against the Defendants, for the following relief, in connection with the Second Defendant's breach of the Joint Venture Agreement and the First Defendant's breach of the Collateral Agreement and Warranty.'

....

- '(2) An order by way of specific performance of the Collateral Agreement and Warranty, that the First Defendant do allot and issue to the Claimants their respective shares in the First Defendant, in accordance with the terms of the Joint Venture Agreement.'

[13] On the basis of this amended pleading I gave permission to serve out on the second Defendant in England. Service was effected on 7 June 2010.

- [14] On 5 July 2010 Nilon filed an application under CPR 9.7(1)(b) and/or for a stay on forum grounds. On 21 October 2010 I held that there were no grounds for setting aside service on Nilon, or for staying the proceedings on forum grounds.
- [15] On 6 Aug 2010 the second Defendant applied under CPR Part 9.7 to set aside service, on the grounds that there was no 'serious' (as it was put) issue between the Claimants and Nilon to which he could be a necessary and proper party. Alternatively, the second Defendant said that service should be set aside because the BVI is not the natural and appropriate forum.
- [16] In deciding the second Defendant's application to set aside service on 21 October 2010, I described the Claimants' cause of action against Nilon as based upon the allegation that when it was incorporated on 7 November 2002 an implied agreement and warranty collateral to the JVA ('the collateral warranty') arose between the second to fourth Claimants and the defendants with the 'intent' set out in paragraph 14 of the amended statement of claim. The collateral warranty is alleged to have been necessary to give business efficacy to the JVA. Nilon, although allegedly a party to this collateral warranty, is nevertheless and mysteriously said to be 'fixed with knowledge' of it. It is pleaded that the second to fourth Defendants relied upon the foreseeable expectations created by the collateral warranty and that Nilon is estopped from resiling from its obligation to issue shares in accordance with the pleaded JVA.
- [17] I held that this had only to be stated for it to be seen to be no more than a long winded way of saying that Nilon is bound by a pre-incorporation contract to which it was not and was never intended to be a party. I described such an allegation as obviously insupportable. Indeed, Mr Mark Forte, who appeared on that occasion together with Mr Jerry Samuel for the Claimants, made no attempt to support it.
- [18] Instead, in reliance upon the pleaded allegations in paragraph 18 of the amended statement of claim, Mr Forte contended that between June 2004 and February 2006 the second to fourth Claimants, or persons acting on their behalf, made payments to Nilon 'in consideration for' the shareholdings set out in the JVA. These payments are pleaded as having been made 'in pursuance of the JVA and of [the collateral warranty]', which latter I had already held to be no more than another way of saying that they were made pursuant to the JVA. Mr Forte relied further upon the pleading in paragraph 19 of the amended statement of claim that between June 2004 and

February 2006 substantial sums of money, described as 'dividends,' are said to have been paid pursuant to the JVA.

- [19] Mr Forte submitted that these facts carried with them the necessary implication that there must have existed an enforceable contract of allotment between Nilon and the second to fourth Claimants. For the reasons set out in my judgment of 21 October 2010 I held that they did not, so that there was no serious or real issue to be tried as between the Claimants and Nilon. The result was that CPR 7.3(2)(a) had no application and I accordingly set aside service upon the second Defendant.
- [20] On 23 November 2010 (some 20 or so days out of time) the Claimants filed a Notice of Application to the Court of Appeal seeking permission to appeal my judgment. I understand that the application will be dealt with during the sittings due to commence in this Territory on 11 January 2011. I have not been shown a copy of this Notice, but I am told that it does not challenge my holdings on the collateral warranty/implied contract of allotment points. Instead, I am told that it attempts to resurrect the argument made on the ex parte application (but not run on the second Defendant's set aside application) that there is a real issue to be tried between the Claimants and Nilon under section 43 of the Business Companies Act, 2004 ('section 43' 'the Act').

The present applications

- [21] On 1 November 2010 Nilon issued an application under CPR 26.3 and 15.2, based upon my reasoning in acceding to the second Defendant's application to set aside service, on the grounds that Nilon had no case to answer under the collateral warranty/implied obligation pleading. On 25 November 2010 the Claimants filed a notice of application to stay these proceedings until the Claimants' application to the Court of Appeal is finally determined.
- [22] Both applications came before me on 9 December 2010, when I rejected the Claimants' stay application and stood over Nilon's strike out/summary judgment application until 14 December 2010. Mr Forte, who appeared together with Mr Jerry Samuel for the Claimants on this hearing also, asked me at the end of the hearing on 14 December 2010 to reconsider my decision on this point, but I remain of the view that I was right to refuse a stay. The remainder of this judgment deals with Nilon's strike out/summary judgment application.

[23] Mr Forte did not argue that Mr Cruickshank, who appeared together with Ms Fiona Forbes for Nilon, was wrong in submitting that there was no case to answer on those parts of the Claimants' amended statement of claim which relied upon a collateral warranty or (although not expressly pleaded) an implied contract of allotment, although he did not formally abandon those points.

[24] Instead, Mr Forte relied upon paragraphs A to F of the prayer to the amended statement of claim, which are in the following terms:

“CLAIM

A. A declaration that the First Claimant, as nominee of the Second Claimant, is the owner of 37.5% of the issued shares in the First Defendant, pursuant to the Joint Venture Agreement.

B. A declaration that the Third Claimant is the owner of 10% of the issued shares in the First Defendant, pursuant to the Joint Venture Agreement.

C. A declaration that the Fourth Claimant is the owner of 10% of the issued shares in the First Defendant, pursuant to the Joint Venture Agreement.

D. An order that the register of members of the First Defendant be rectified forthwith, pursuant to section 43(1)(a) of the BVI Business Companies Act 2004, to give effect to the true and proper state of affairs pertaining to it, in accordance with the terms of the Joint Venture Agreement and the Collateral Agreement and Warranty, by entering the names and addresses of the First, Third and Fourth Claimants as the legal owners of the relevant number of shares in the First Defendant.

E. An order that the Second Defendant in his capacity as the sole director and/or controller of the First Defendant take all necessary steps to give effect to the said orders.

F. An order for interim and/or final injunctive relief, requiring the First and Second Defendants to give effect to paragraphs A, B, C and D above.'

[25] Mr Forte submits that, despite the present *de facto* abandonment of his claims based on collateral warranty/implied contract of allotment, the fact that he has claims under the joint venture agreement against the second Defendant for a mandatory injunction or an order for specific performance to compel him to procure that Nilon issues the claimed number of shares to the relevant Claimants means that they are entitled to assert a claim under section 43 against Nilon for rectification of Nilon's register of members. Section 43 reads as follows:

'Rectification of register of members

43. (1) If

- (a) information that is required to be entered in the register of members under section 41 is omitted from the register or inaccurately entered in the register, or
- (b) there is unreasonable delay in entering the information in the register,

a member of the company, or any person who is aggrieved by the omission, inaccuracy or delay, may apply to the Court for an order that the register be rectified, and the Court may either refuse the application, with or without costs to be paid by the applicant, or order the rectification of the register, and may direct the company to pay all costs of the application and any damages the applicant may have sustained.

(2) The Court may, in any proceedings under subsection (1), determine any question relating to the right of a person who is a party to the proceedings to have his name entered in or omitted from the register of members, whether the question arises between

- (a) two or more members or alleged members, or
- (b) between members or alleged members and the company,

and generally the Court may, in the proceedings, determine any question that may be necessary or expedient to be determined for the rectification of the register of members.'

The relevant parts of section 41 of the Act ('section 41') for present purposes are:

"Register of members

41(1) A company shall keep a register of members containing, as appropriate for the company,

- (a) the names and addresses of the persons who hold registered shares in the company;
- (b) the number of each class and series of registered shares held by each shareholder'

[26] Sections 41 and 43 are part of Division 1 of Part III of the Act. Part III is headed 'Shares' and Division 1 is headed 'General'. Sections 33 to 40A of Part III Division 1 deal with the legal nature of shares, the rights attaching to shares and the manner in which they may be issued. Section 41, as I have said, deals with the register of members which each company registered under the Act is obliged to maintain and imposes criminal sanctions for breach. Subsection 42(1) provides that the entry of a person's name in the register of members is prima facie evidence that he is the legal owner of them and subsection 42(2) entitles the company to ignore the rights of all persons other than the holder of a registered share when it comes to voting, notices, distributions and the exercise of all other rights and powers attaching to the share. Finally, section 44 deals with share certificates.

[27] It can thus be seen that section 43 takes its place in the context of provisions dealing with the issue of the shares in companies incorporated under the Act and with the manner in which the holders of those shares are recorded in the books of registered companies and, where certificates are issued, in share certificates of the company. In my judgment the right given by subsection 43(1)(a)¹ to a member of a company (or any person aggrieved) to apply to the Court to have the register of members rectified in case of omission or inaccuracy in the register of members, is exercisable, and the jurisdiction of the Court to make an order for rectification arises, only if either (a) information which section 41 required to be entered in it has been omitted from it or (b) any such information has been entered inaccurately. In the present case the only information of any relevance to the present case which is required by section 41 to be entered in Nilon's register of members is the name and address of each person holding registered shares, together with the number of each share held. There is no evidence that the name and address of any holder² of a registered share in Nilon (or the numbers of any such shares held) has been omitted from or inaccurately entered in its register of members. In my judgment, therefore, it is not shown that any person has the right to apply under subsection 43(1) for the register of members of Nilon to be rectified, or that there is currently any jurisdiction in the Court to make an order under section 43 rectifying Nilon's register of members.

¹ subsection 43(1)(b) can be ignored for present purposes. In what follows, for the sake of simplicity of exposition, I shall confine my reasoning to subsection 43(1)(a)

²assuming that that term is wider than 'shareholder' as defined in section 78 of the Act and includes those entitled to assert present ownership of shares in a registered company. Any other construction would render section 43 meaningless.

- [28] In the face of this very clear statutory language, Mr Forte submits, however, that his clients have a claim under the Joint Venture Agreement against the second Defendant which, if it succeeds, will result in an order against the second Defendant requiring him to procure that Nilon issue shares to the relevant Claimants. He says that that claim can be made, as I understand him, under the umbrella of a claim against Nilon under section 43. In support of this submission, he relies upon the terms of subsection 43(2), which he says, correctly, show that the Court may decide disputed questions of title and generally determine any question that it may be necessary to decide for the purpose of rectification.
- [29] The first objection to this submission is that the discretion of the Court to decide such questions arises, as a matter of statutory language, only in proceedings under subsection 43(1). Since, for the reasons which I have given, there is no one with the right to bring proceedings under subsection 43(1), the occasion for the Court to use its discretion under subsection 43(2) does not arise.
- [30] In any case, even if the second Defendant remained a party to these proceedings, the dispute between the Claimants and the second Defendant in the present case would result, if the Claimants were successful, only in an order *in personam* against the second Defendant requiring him to procure the issue of shares by Nilon. It would give the Claimants no interest in any shares issued or to be issued by Nilon. The Claimants would still, on the conclusion of these proceedings in their favour, be no closer to being able to assert that the name of a holder of Nilon shares had been omitted from its register of members, because an order against the second Defendant requiring him to procure that Nilon issue shares to the Claimants would not make them holders of any of its shares.
- [31] Even if the Claimants obtained their order against the second Defendant and if the second Defendant refused to comply with it (or Nilon refused to allot shares to the Claimant), still the Court could not order rectification of Nilon's register of members, since unless and until Nilon actually allots shares to the Claimants and then neglects to register them as the holders of such shares, it will not be the case that the name of any holder of shares in Nilon will have been omitted from its register of members.

- [32] For the reasons given earlier, the Claimants cannot obtain an order against Nilon that it allots shares to them. But even if they could do so, no breach of subsection 41(1) requiring rectification of Nilon's register of members under section 43(1) would occur unless and until Nilon had neglected to rectify its register of members to record the fact that allotments had been made.
- [33] In short, none of the Claimants can show that he has a cause of action against Nilon under section 43.
- [34] Mr Forte's submissions ignore the words 'in any proceedings under subsection (1)' where they occur in subsection 43(2). It is only if subsection 43(1) is engaged that the discretion to decide consequential issues arises under subsection 43(2). So, for example, a company which had omitted to add the name of a person claiming to be an allottee of its shares to its register of members might wish to argue, on his application for rectification of the register, that the resolution purporting to authorize the allotment was invalid. In such circumstances, section 43(2) would give the Court the discretion to determine that issue in the context of an application for rectification of the register of members, rather than directing that the applicant bring separate proceedings to determine it. Similarly, a person claiming that he should be registered as the transferee of shares might be met with an objection by the transferor that the transfer had been rescinded. The Court could deal with that issue, if it saw fit, in the context of rectification proceedings. Whether the Court would do so in any given case, rather than directing separate proceedings to be brought, would be a matter for its discretion. The function of subsection 43(2) is to provide the Court with that discretion.
- [35] There is, in my judgment, nothing surprising in these conclusions. The purpose of section 43 is to enable the Court to act to ensure that a company's register of members accurately reflects the state of its membership³. That is why it is to be found in Division 1 of Part III of the Act. It is not there in order to be used to establish title to shares, let alone to determine whether a defendant is in breach of a contract to procure that a company will issue shares.
- [36] Mr Forte placed great reliance upon the decision of the Court of Appeal of England and Wales in **Re Hoicrest Ltd**⁴. In that case the holder of a single share in a quasi partnership company

³ in the broad sense of that word

⁴ [2000] 1 BCLC 194

claimed that, of 98 shares subsequently issued to his co-venturer, 49 were held by her for him as beneficial owner. Instead of commencing proceedings against the lady for a declaration as to her trusteeship, he ill-advisedly applied under section 359 of the English Companies Act 1985 ('section 359') for rectification of the register of members of the company to show him as the holder of 49 of the 99 shares registered in her name. The relevant parts of section 359 read as follows:

"Power of court to rectify register

359. (1) If

- (a) the name of any person is, without sufficient cause, entered in or omitted from a company's register of members, or
- (b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,

the person aggrieved, or any member of the company, or the company, may apply to the court for rectification of the register.

(2) The court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On such an application the court may decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.'

[37] It will be noticed that the wording of subsection 359(1) differs from that of subsections 43(1) and 41(1). Under the latter provisions, the only information whose omission can be complained of is the name of a person who *holds* registered shares⁵ (emphasis added). That may, in any given case, give rise to a different inquiry from that which arises under section 395, which is whether a party's name has been left off the register 'without sufficient cause.'

⁵ or the numbers of shares so held

[38] In **Hoicrest** the judge at first instance struck out the application, holding that since the applicant had not produced a share transfer form to the company, it did have 'sufficient cause' for omitting his name from the register.

[39] A two judge Court of Appeal (Mummery LJ delivering the only reasoned judgment) held that the argument for the respondent (that the right to apply under section 359 had not arisen and that the Court accordingly had no jurisdiction under the section) failed to recognise the wide powers of the Court under subsection 359(3):

'The difficulty with [Counsel for the respondent's] argument, which concentrates on the requirements of s359(1), is that it does not give full effect to the wide powers of the court under sub-s (3). Mr Taube contends that those powers are subject to the prior limitations and requirements in sub-s (1). Circularity creeps into the argument. The answer is to be found, in my view, in an appreciation of the distinction between jurisdiction and discretion. Jurisdiction to rectify is conferred by sub-s (1). A general discretionary power is conferred on the court by sub-s (3) so that a court, to which an application to rectify is made may, on such application –

'decide any question relating to the title of a person who is a party to the application to have his name entered in or omitted from the register ... and generally may decide any question necessary or expedient to be decided for rectification of the register.'

There is such a question here: the title of Mr Keene to the 49 shares which he claims should be registered in his name. It is true that, as Mr Taube contends, Mr Keene must establish that he has title to be entered in the register as a member in respect of the 49 shares. But, if there is a dispute about that title, sub-s (3) empowers the court 'on such an application' to decide that question. It is true that the court would not make an order which required the company or its board to act in contravention of s 183 or the articles. But that inhibition on making an order does not prevent the court from resolving, prior to deciding whether or not to make an order for rectification, relevant disputes about entitlement to the shares⁶.'

⁶ at pages 198h to 199c

[40] It is important to be clear about what the Court of Appeal was not deciding in **Hoicrest**. It did not decide that the applicant had a cause of action under section 359 against the company. Indeed, it specifically held⁷ that he did not:

‘[The applicant] cannot presently say that he has been omitted from the register ‘without sufficient cause.’ At the date of the issue of the proceedings he was not entitled to ask the court to make an order for rectification and the court had no power to make it.’

What the Court of Appeal held was that despite that being the position, the court nevertheless had jurisdiction under section 359 to hear and determine the dispute as to beneficial ownership of the respondent’s shares within the context of a section 359 application. The decision itself was in essence procedural:

‘Since the hearing before the judge the Civil Procedure Rules 1998, SI 1998/3132 have come into force. In my judgment, they are applicable to the exercise of the discretion under sub-s (3), whether by this court or by a judge in the Chancery Division if the matter were remitted. On this aspect of the case this court is in as good a position as the judge to exercise the discretion to determine the future conduct of this matter. The overriding objective in CPR 1.1 is more likely to be furthered under CPR 1.4 by actively managing this case with appropriate directions than by simply striking it out, thereby leaving it open to Mr Keene to state a Chancery action. The critical issue of fact (ie the alleged oral agreement in April 1992) has been identified; full investigation and trial of that issue may be necessary, depending on how the case is pleaded; a timetable needs to be fixed to ensure that the case now progresses quickly and efficiently; it is likely to be more cost effective to proceed in this way than to put Mr Keene to the unnecessary expense of issuing fresh proceedings.’

[41] In my judgment, therefore, **Hoicrest** does not assist the Claimants. It gets them no nearer showing that their pleading discloses any reasonable grounds for a claim to have Nilon’s register of members rectified or that they have any prospect of succeeding in obtaining such relief at trial. Dressing up the claim against the second Defendant as made under subsection 43(2) makes no difference to the fact that the Claimants can show no right to any relief against Nilon, whether under section 43(1) or at all.

[42] Because the point was fully argued, however, and because it is of some importance as a matter of practice, I should deal with what Mummery LJ said in the passage which I have set out in

⁷ at page 198e

paragraph [39] above. The reason, if I may say so, why Mummery LJ felt that circularity had crept into the argument was because he had introduced it himself. The discretion to resolve disputes as to title is given to the Court, as subsection 359(3) itself makes clear⁸, in aid of the inquiry to which subsection 359(1) is directed – whether a person's name has been omitted from the register without sufficient cause. In **Hoicrest** it was never going to be established that the company had omitted the applicant's name without sufficient cause, because he had never asked to be registered and, more importantly, had no immediate right to be registered. If a rectification application is made by a person clearly having no present right to be registered (as the Court of Appeal accepted was the case in **Hoicrest**), then the inquiry which subsection 359(1) prompts is answered *in limine*. There is no need in such a case for the Court to go on to resolve ancillary questions, because by definition there are none.

[43] Mummery LJ, in other words, treated the ancillary provisions of subsection 359(3) as conferring a self standing jurisdiction to decide under the section who owns what – regardless whether the company's register of members included the names of all those persons whose names should have been included in it and did not include the names of any persons whose names should not have been included. I believe that he was wrong to do so. The only inquiry called for under section 359 is whether a person's name has been omitted from (or wrongly included in) a company's register of members without sufficient cause. Subsection 359(3) does not broaden the scope of that inquiry, it merely provides the Court with the discretion to resolve consequential issues arising along the path of that inquiry. The inquiry itself remains the same. Once this point is recognised, all questions of circularity disappear.

[44] In the instant case the inquiry which would fall to be made under section 43 is whether the names of the holders of any shares in the capital of Nilon have been omitted from the Register. The answer to that inquiry is, clearly, no. As I have endeavoured to explain, that will remain the case even if the Claimants succeed in their claim against the second Defendant. It therefore makes no practical difference whether there is jurisdiction under subsection 43(2) to determine the dispute between the Claimants and the second Defendant, although, for the reasons which I have given, I do not consider that there is any such jurisdiction in the absence of an arguable claim under subsection 43(1). Either way, though, the Claimants have no case against Nilon under section 43.

⁸ 'on such an application'

[45] In my judgment the common practice of automatically appealing to section 43 whenever a question arises about entitlement to the shares of a BVI company, regardless whether the applicant or claimant has a right to rectification of its register of members, is a bad one and should be abandoned. Claims under section 43 should be made only when the claimant shows or has reasonable grounds for claiming that a company's register of members is defective by reference to section 41.

Conclusion

[46] Accordingly Nilon's application succeeds.

[47] The Claimants must pay Nilon's costs of the application, to be assessed if not agreed.

Commercial Court Judge

21 December 2010